1989

The State of Utah v. Karen Marie Johnson : Petition for Writ of Certiorari

Utah Supreme Court

Debra K. Loy; Joan C. Watt; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.
R. Paul Van Dam; Attorney General; Dan R. Larsen; Assistant Attorney General; Attorneys for Respondent. .

IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN MARIE JOHNSON,

Petitioner/Appellant,

v.

THE STATE OF UTAH,

Respondent/Appellee.

Case No.
Priority No. 2

THE STATE OF UTAH,

Plaintiff/Respondent,

v.

KAREN MARIE JOHNSON,

Defendant/Appellant.

Case No. 870222-CA
Priority No. 2

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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May 9, 1989

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: State v. Johnson, Case No. 870222-CA

Dear Mr. Butler:

The respondent, State of Utah, hereby waives the filing of a response brief to the Petition for Writ of Certiorari to the Utah Court of Appeals in the above-referenced matter. The reason for the waiver is that the opinion of the Utah Court of Appeals adequately addresses the issues raised in the petition. However, a response brief will be provided if the court so requests.

Very truly yours,

DAN R. LARSEN
Assistant Attorney General

DRL:bks

cc: Debra K. Loy
Joan C. Watt

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Petitioner/Appellant,	:	
v.	:	
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ISSUES PRESENTED FOR REVIEW

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2. Did defense counsel preserve her argument that the Utah Constitution was violated where she cited the specific provision of the state constitution in her Motion to Suppress and Memorandum in Support thereof and orally argued that the state constitution was violated but failed to cite any cases in support of her position?

TEXT OF CONSTITUTIONAL PROVISIONS

The fourth amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, §14 of the Constitution of Utah provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched and the person or thing to be seized.

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Petitioner/Appellant,	:	
v.	:	
THE STATE OF UTAH,	:	Case No. Priority No. 2
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OPINION BELOW

The opinion of the Court of Appeals in State v. Johnson, 104 Utah Adv. Rep. 34 (Ct. App. 1989) (Case No. 870222-CA, filed March 21, 1989), is attached hereto as Appendix A. On April 4, 1989, Petitioner timely filed a Petition for Rehearing in the Court of Appeals. On April 5, 1989, the Court of Appeals denied Appellant's Petition for Rehearing. A copy of that Court's order denying the Petition for Rehearing is attached hereto as Appendix B.

JURISDICTION

The Utah Court of Appeals filed its opinion on March 21, 1989. Appellant filed her Petition for Rehearing on April 4, 1989. The Petition for Rehearing tolled the period in which this Petition for Writ of Certiorari must be filed. Rule 45(c), Rules of the Utah Supreme Court (1986). This Petition for Writ of Certiorari is therefore timely filed pursuant to Rule 45, Rules of the Utah Supreme Court. This Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(5) (Supp. 1988) and Utah Code Ann. §78-2-2(3)(a) (Supp. 1988).

STATEMENT OF THE CASE

This is an appeal from a judgment and conviction for Possession of a Controlled Substance, a class A misdemeanor, in violation of Utah Code Ann. §58-37-8 (1953 as amended). Ms. Johnson was found guilty on April 1, 1987, after a bench trial in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge, presiding. The Court of Appeals affirmed her conviction in a decision dated March 21, 1989.

STATEMENT OF THE FACTS

On November 3, 1986, Deputy Stroud stopped a 1972 Mercury Capri with a broken brake light (T. 5-6). Prior to approaching the vehicle, the officer ran a check on the license plates and obtained the name of the registered owner (T. 6). He then approached the driver and asked for identification (T. 6).

The driver produced a driver's license but was unable to produce registration which the officer requested when he learned that the driver was not the registered owner (T. 6). The officer then asked the passenger, the Petitioner in this case, for identification (T. 6-7).[1] Petitioner told the officer she did not have identification but gave him her name and date of birth. The deputy took the driver's license and information from Petitioner to his vehicle where he called dispatch and inquired whether there were any outstanding warrants on Petitioner (T. 7, 15). The deputy testified that he ran a check on Ms. Johnson "[b]ecause there was a possibility that [the] vehicle could have been stolen" (T. 7-8).

However, the officer did not ask the driver how she came to be in possession of the vehicle or otherwise attempt to ascertain whether the vehicle was stolen by questioning the driver or Petitioner. The officer also did not run a check to determine whether the car was stolen (T. 12) and acknowledged that it was not unusual to stop cars and find that the owner was not driving (T. 17, 18).

The car was in fact not stolen (T. 16) and the only

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[1] In reaching its decision, the Court of Appeals relied on the trial judge's statement "that where there is a legitimate traffic stop, the driver has a suspended license, and there is 'no way of telling who the owner of the vehicle is and whether they have permission to drive it because the owner is not present,' a reasonable officer would inquire regarding the identity of a passenger." Johnson, 104 Utah Adv. Rep. at 35. However, the officer did not learn that the driver's license was suspended until after he detained Ms. Johnson and ran a warrants check on her (T. 8). Both courts erred in relying on this information.

information which made the officer speculate that it might be stolen was the fact that the registered owner was not driving and the driver was unable to find registration materials (T. 7-8). Other than being a passenger in the vehicle, Ms. Johnson did not say or do anything which would suggest that, even if the vehicle were stolen, she was involved in the criminal activity.

The officer further acknowledged that ascertaining whether Ms. Johnson had a valid driver's license would not help him determine whether the car was stolen (T. 15) but claimed that if Ms. Johnson had outstanding warrants for car theft, he "possibly" would think it more likely that the vehicle had been stolen (T. 16).

The officer testified that it was his normal procedure to obtain the name and date of birth of passengers in a traffic stop and that he routinely used this practice to pick up people who might have outstanding warrants (T. 20, 21).

Several minutes after the officer returned to his vehicle, dispatch informed him that the driver had a suspended license and Ms. Johnson had an outstanding traffic warrant (T. 7, 8, 15). The officer arrested Ms. Johnson and, incident to that arrest, searched her bag and found the evidence which gave rise to the instant case (T. 9-11).

Prior to trial, Ms. Johnson filed a motion to suppress all evidence seized from her person or property on the grounds that the items seized were the fruit of an unlawful seizure of her person in violation of the fourth amendment to the federal constitution and Article I, §14 of the Utah Constitution. See Appendix C. The trial

court held an evidentiary hearing, after which it denied the motion "unless defendant can submit law to the contrary" (R. 17). See trial judge's ruling from the bench, T. 35-36, as set forth in Appendix D.

ARGUMENT

POINT I. THE DECISION OF THE COURT OF APPEALS THAT THE OFFICER HAD A REASONABLE ARTICULABLE SUSPICION TO JUSTIFY THE DETENTION OF PETITIONER FOR A WARRANTS CHECK IS IN CONFLICT WITH EXISTING FOURTH AMENDMENT CASE LAW.

A majority of the panel in the Court of Appeals which heard the instant case held that the officer had a reasonable articulable suspicion to justify the detention of Ms. Johnson under the fourth amendment. Johnson, 104 Utah Adv. Rep. at 35-6. Judge Orme dissented, stating simply:

> The only facts relied on by the officer were that the driver's name was not the name of the registered owner and the driver was not able to locate the registration certificate. These facts are just as consistent with the more likely scenario that the driver borrowed the car from its rightful owner. Absent more--and this is all the officer pointed to--there was simply no articulable suspicion, as a matter of law, that the car had been stolen.

Id. at 36. In reaching its decision, the majority misconstrued the facts in this case and misapplied the law.

In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court carved out a limited exception to the general probable cause requirement under the fourth amendment. In order to justify a particular detention, an officer must be able to point to specific

articulable facts which, when viewed under an objective standard, create a reasonable suspicion that the defendant has committed or is about to commit a crime. Terry v. Ohio, 392 U.S. 1 (1968); Florida v. Royer, 460 U.S. 491 (1983). This Court and the Utah Court of Appeals have applied that standard in numerous cases. See e.g. State v. Swanigan, 699 P.2d 719 (Utah 1985) (per curiam); State v. Carpena, 714 P.2d 675 (Utah 1986); State v. Trujillo, 739 P.2d 85 (Utah App. 1987); State v. Sierra, 754 P.2d 972 (Utah App. 1988).

As the Court of Appeals held (and the State did not dispute in its brief), the officer seized Ms. Johnson within the meaning of the fourth amendment when he detained her to run a warrants check. See Johnson, 104 Utah Adv. Rep. at 35; see also United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) (detaining a defendant for a warrants check is a seizure under the fourth amendment and requires that the officer have a reasonable articulable suspicion to justify the seizure).

The only articulable facts known to the officer at the time he detained Ms. Johnson were that the driver was not the owner of the vehicle and the driver could not find the registration. The Court of Appeals erred in relying on the trial court's statement that

> where there is a legitimate traffic stop, the driver has a suspended license, and there is "no way of telling who the owner of the vehicle is and whether they have permission to drive it because the owner is not present," a reasonable officer would inquire regarding the identity of a passenger.

104 Utah Adv. Rep. at 35 (emphasis added). Contrary to the

assertions of the trial court and the Court of Appeals, the officer did not know that the driver's license was suspended when he detained the passenger (T. 8). The officer simply asked the Petitioner her name immediately after obtaining identification from the driver, because it was his normal procedure to run the name and date of birth of passengers in traffic stops and he routinely used this practice to pick up people who might have outstanding warrants (T. 20, 21).

In an attempt to justify the detention, the officer testified that he ran a check on Petitioner "[b]ecause there was a possibility that [the] vehicle could have been stolen" (T. 7-8). However, he did not ask the driver or Petitioner who owned the car or how the driver came to be in possession of it. Nor did he run a check to see whether it was stolen (T. 12) or otherwise pursue that "possibility."

A "possibility" is not equivalent to a constitutionally required reasonable articulable suspicion. It is more along the lines of a hunch or speculation, neither of which support a seizure under the fourth amendment. See State v. Trujillo, 739 P.2d 85, 90 (Utah App. 1987).

Furthermore, a "possibility" that a car is stolen does not automatically implicate the passenger in any illegal activity. See State v. Banks, 720 P.2d 1380, 1382-3 (Utah 1986). "[A] person's mere presence in the company of others whom the police have probable cause to search does not provide probable cause to search that person." Id. citing United States v. Di Re, 332 U.S. 581, 587,

68 S.Ct. 222, 225, 92 L.Ed.2d 210 (1948).

Furthermore, assuming arguendo the meager facts known to the officer at the time he detained Ms. Johnson did in some way amount to a reasonable articulable suspicion that the vehicle was stolen and that Ms. Johnson was somehow implicated, the officer exceeded the scope of any permissible seizure when he detained Ms. Johnson to run a warrants check on her. The permissible scope of any detention would be limited to investigation necessary to ascertain whether the vehicle was in fact stolen.[2] The officer acknowledged that ascertaining whether Ms. Johnson had a valid driver's license would not help him determine whether the car was stolen (T. 15). Furthermore, all of his actions and his testimony (T. 20, 21) indicated that he did not believe the car was stolen but was on a "fishing expedition" to see whether he could find some basis for arresting either occupant of the vehicle.

Under the circumstances of this case, the officer detained Ms. Johnson based on a hunch, speculation or "possibility" and not a constitutionally required reasonable articulable suspicion.

While at first glance this case may seem somewhat inconsequential, the effect of the decision of the Court of Appeals could be overwhelming. It leaves officers with unbridled discretion to detain and run a warrants check on all passengers in vehicles where the owner is not present. Persons who look a little different

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[2] The car was in fact not stolen (T. 16). Ms. Johnson was riding with a friend to pick up a child at school (T. 24).

or who officers want to "shake down" will be detained while wealthier, more mainstream people riding in borrowed cars will not be seized for warrants checks.

Even though common sense and the police officer in the instant case agree that it is not unusual to stop cars and find that the owner is not present (T. 17, 18) and even though the absence of the registered owner is as consistent with innocent behavior as it is with criminal behavior (104 Utah Adv. Rep. at 36, Orme, J., dissenting), officers will be free to detain all occupants of a vehicle who are riding in borrowed cars. Such a result does not comport with the freedoms guaranteed by our society or with the reasonable expectation of privacy guaranteed by the fourth amendment.

Ms. Johnson respectfully requests that this Court grant her Petition for Writ of Certiorari on this issue.

POINT II. IN REACHING ITS DECISION THAT APPELLANT FAILED TO PRESERVE THE UTAH CONSTITUTIONAL ISSUE FOR REVIEW, THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF STATE LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

In her opening brief before the Court of Appeals, Appellant/Petitioner argued that her detention violated Utah statutory and constitutional law. See Appellant's opening brief at 9-12. She argued that the search and seizure provision of the Utah Constitution offers a greater protection than its federal counterpart and cited several cases from other jurisdictions which had been decided on state constitutional grounds in support of her argument, e.g. State v. Williams, 366 So.2d 1369 (La. 1978). See

Appendix E for entire text of Petitioner's argument on this issue in her opening brief.

In its decision, the Court of Appeals declined to address this argument because "defendant failed to brief or argue these issues at the trial level . . . ." State v. Johnson, 104 Utah Adv. Rep. 34, 35 (Utah App. 1989). The Court stated that "[n]ominally alluding to such different constitutional guarantees without any analysis before the trial court does not sufficiently raise the issue to permit consideration by this Court on appeal [citation omitted]." Id.

In her written Motion to Suppress in the instant case, Petitioner specifically stated that the Utah Constitution had been violated.[3] In her Memorandum in Support of that Motion to Suppress, Petitioner correctly referred to Article I, Section 14 of the Utah Constitution. At oral argument on the Motion to Suppress, Petitioner also referred to the Utah Constitution. Defense counsel stated:

> . . . I think it violates the Utah Constitution as well, although that has not been developed in the case law very well, . . ."

T. 40. Hence, in the instant case, Petitioner specifically referred to the state constitution and recognized that there had been no separate analysis in making her argument to the trial court. She afforded the trial court every opportunity to decide the issue under

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[3] Petitioner erroneously referred to Article I, Section 13 of the Utah Constitution in this motion. See Appendix C.

the Utah Constitution.

In State v. Watts, 750 P.2d 1219 (Utah 1988), a majority of this Court, comprised of Justice Hall, Justice Howe and Justice Orme of the Court of Appeals, pointed out that this Court has never drawn any distinctions between the protections afforded by the Utah Constitution and the federal constitution in the search and seizure context. However, in footnote 8, this Court pointed out that:

> in declining to depart in this case from our consistent refusal heretofore to interpret Article I, Section 14 of the our constitution in a manner different from the fourth amendment to the federal constitution, we have by no means ruled out the possibility of doing so in some future case.

Id. at 1221.

In his dissent in Watts, Justice Zimmerman pointed out that he did not agree with the majority's assertions that the Court had never drawn any distinctions between the two constitutions. Id. at 1225. Justice Durham concurred with Justice Zimmerman's dissent.

Given the uncertainty reflected in Watts as to whether any distinctions between the search and seizure provisions in the two constitutions have been drawn in the past or will be drawn in the future, defense counsel's statement that the Utah constitutional provision "has not been developed in the case law very well" (T. 40) raised the issue for the trial court and reflected the current state of the law.

The decision in Watts also reflects what has become a difficult position for criminal defense lawyers. Criminal defense lawyers are, for the most part, aware that this Court is interested

in a separate analysis of issues under the Utah Constitution. However, because very little separate Utah Constitutional case law has been developed and because other states rarely offer a case on point, defense lawyers often have little substance to argue other than that if the federal constitution does not protect the defendant, the state constitution does. Given the paucity of state constitutional case law, such an argument at the trial level should preserve a Utah Constitutional issue for appellate review.

In reaching its decision that this issue had not been preserved for appeal, the Court of Appeals relied on two opinions of this Court, State v. Carter, 707 P.2d 656 (Utah 1985), and State v. Lee, 633 P.2d 48 (Utah 1981). In Lee, the defendant had argued at the trial court that the search was unlawful, thereby making the seizure unlawful, but had not argued that the seizure alone was unconstitutional. On appeal, the defendant raised the seizure issue for the first time, and this Court refused to address it. Lee, 633 P.2d at 52-3.

In Carter, the defendant argued at the trial court that the frisk of his person following his arrest was unlawful. On appeal, he argued for the first time that the search of his backpack was unlawful because it was out of his possession at the time of the search. This Court again refused to address the issue because it had not been raised in the trial court. Carter, 707 P.2d at 660-1.

Unlike Carter or Lee, Petitioner did not bring up the Utah Constitutional issue for the first time on appeal. Petitioner's argument throughout has been that the detention of her

person, where she was a passenger in a vehicle stopped for a faulty equipment violation, was unlawful. She in fact raised the Utah constitutional issue in the trial court and recognized that a separate Utah Constitutional analysis has not yet been developed in case law. Furthermore, Utah Code Ann. §77-7-15 (1953 as amended) is merely a codification of the constitutional protections against search and seizure and is raised implicitly when either the federal or state constitutional provision is argued.

The haste with which matters proceed to trial and the practical realities of criminal defense practice rarely offer trial attorneys the opportunity to fully research an issue, especially in an area where this Court or the Court of Appeals has not yet issued an opinion and the likelihood that the trial court would rule favorably is slim. The impact of the Johnson decision, if it is allowed to remain as the Court of Appeals has written it, may be that this Court and the Court of Appeals will see less briefing on state constitutional issues because in most cases, even where trial counsel separately referred to the state constitution, there will be a serious preservation issue on appeal.

The decision of the Court of Appeals fails to give criminal defendants a clear picture of the extent of argument which is necessary at the trial court level in order to preserve a state constitutional issue for appeal. Where provisions of the state constitution have not been analyzed in case law requiring trial counsel to do more than name the applicable provision of the Utah Constitution leaves appellate and trial counsel in a "never-never

land" where it is unclear in almost any case where little analysis exists as to what exactly must be done to preserve an issue. The next step from Johnson is to refuse to review an issue on appeal because in making his argument on appeal, defendant emphasizes a case which he did not rely on at the trial court level. Such a position would turn the requirement that an issue be preserved at trial into an elaborate game for which no one knows the precise rules.

Ms. Johnson respectfully requests that this Court grant a writ of certiorari on this issue, issue a bright line ruling that argument at the trial court that a specific article and section of the Utah Constitution is violated is sufficient to preserve a Utah Constitutional issue for appellate review, and address the Utah constitutional issue raised in this case.

CONCLUSION

Ms. Johnson respectfully requests that this Petition for Writ of Certiorari be granted and that this Court review the issues addressed herein.

SUBMITTED this 4 day of May, 1989.

Debra K. Loy

DEBRA K. LOY
Attorney for Defendant/Appellant

Joan C. Watt

JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 4 day of May, 1989.

Joan C. Watt

JOAN C. WATT

DELIVERED by _____ this _____ day of May, 1989.

_____

APPENDIX A

Cite as
104 Utah Adv. Rep. 34

IN THE UTAH COURT OF APPEALS

The STATE of Utah,
Plaintiff and Respondent,
v.
Karen Marie JOHNSON,
Defendant and Appellant.

No. 870222-CA
FILED: March 21, 1989

Third District, Salt Lake County
Honorable Raymond S. Uno

ATTORNEYS:

Debra K. Loy, Joan C. Watt, Salt Lake City, for Appellants

Dan R. Larsen, R. Paul Van Dam, Salt Lake City, for Respondents

Before Judges Davidson, Garff and Orme.

OPINION

GARFF, Judge:

Defendant, Karen Marie Johnson, appeals the trial court's denial of her motion to suppress and her conviction for possession of a controlled substance.[1] We affirm.

On November 3, 1986, Deputy Sheriff Stroud stopped a vehicle for having a faulty brake light. Defendant was a passenger in that vehicle. At the suppression hearing, Stroud testified that prior to stopping the vehicle, he ran a check on the license plate and obtained the name of the registered owner. He then approached the stopped vehicle and asked the driver for her license. The name on the license was not the name of the registered owner. When Stroud requested the registration certificate, the driver was unable to produce it. Stroud then asked defendant for identification, reasoning that there was a possibility the car was stolen because there was no registration and no owner present. After initially denying that she had any identification, defendant told Stroud her name and birthdate.

Stating that he would be right back and expecting the driver and defendant to remain, Stroud returned to his vehicle and ran license checks on the two, determining that the driver was driving on a suspended license and that defendant had several outstanding warrants. He did not, however, inquire as to whether the car was stolen, nor did he know of any reports of stolen cars matching that car's description. He then wrote a citation on the driver and requested a backup police officer.

When defendant was informed that she was being arrested for outstanding warrants, she exited the vehicle, holding a backpack which had the name "Karen" on it. Defendant initially denied that the backpack belonged to her, but later admitted that it was hers. Incident to her arrest, the bag was searched and was found to contain amphetamines, drug paraphernalia and defendant's Utah identification.

Defendant's version of the sequence of events varies from Stroud's. She testified that after Stroud received the driver's license, he asked defendant if she had any identification. She said that she did not. He told them to wait, that he would be right back, and returned to his vehicle for five or ten minutes, long enough for her to smoke a cigarette or two. When he returned, he asked for the registration certificate. When it could not be produced, Stroud asked defendant to return to his vehicle with him, where, at his request, she gave him her name and birthdate. He then sent her back to the other car. Fifteen minutes later, he came back to their car, gave the driver a citation, took defendant out of the car, frisked and handcuffed her, and put her in the front seat of the sheriff's car. She had possession of her bag at this time. Defendant stated that she gave Stroud her name and birthdate because she was required to do so, and did not believe that she could leave.

The issues on appeal are: (1) whether defendant may raise, for the first time on appeal, the argument that state law and article 1 section 14 of the Utah Constitution provide greater protection than the fourth amendment of the United States Constitution against unreasonable search and seizure; (2) whether defendant, a passenger in a motor vehicle, was seized within the meaning of the fourth amendment; and (3) if there was a seizure, whether it was reasonable.

In considering the trial court's action in denying defendant's motion to suppress, we will not disturb its factual evaluation unless its findings are clearly erroneous. *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). The trial judge is in the best position to assess the credibility and accuracy of the witnesses' divergent testimonies. *State v. Arroyo*, 102 Utah Adv. Rep. 34, 35 (Ct. App. Feb. 15, 1989); *State v. Sierra*, 754 P.2d 972, 974 (Utah Ct. App. 1988). However, in assessing the trial court's legal conclusions based upon its factual findings, we afford it no deference but apply a "correction of error" standard. *Oates v. Chavez*, 749 P.2d 658, 659 (Utah 1988).

UTAH CONSTITUTIONAL ISSUE

Defendant claims that her detention violated the fourth amendment of the United States Constitution and article 1 section 14 of the Utah Constitution. She also argues that the legislative intent behind Utah Code Ann. §77-7-15 (1980) was to provide greater protection against unreasonable searches and seizures than is provided by the fourth amendment, and that her seizure violated the provisions of

both constitutions.[2] However, defendant failed to brief or argue these issues at the trial level and first raised her statutory argument in her appellate brief. Nominally alluding to such different constitutional guarantees without any analysis before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal. *James v. Preston*, 746 P.2d 799, 801 (Utah Ct. App. 1987). "[W]here a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal .... [M]otions to suppress should be supported by precise averments, not conclusory allegations ...." *State v. Carter*, 707 P.2d 656, 660-61 (Utah 1985). Also, in *State v. Lee*, 633 P.2d 48, 53 (Utah 1981), the supreme court stated:

> There is nothing in the record to indicate that the point now urged upon this Court was unavailable or unknown to defendant at the time he filed his motion to suppress, and to entertain the point now would be to sanction the practice of withholding positions that should properly be presented to the trial court but which may be withheld for the purpose of seeking a reversal on appeal and a new trial or dismissal.

We, therefore, decline to consider this argument on appeal.

SEIZURE

Defendant avers that she was seized within the meaning of the fourth amendment because she felt that she was not free to leave when Stroud told her to wait while he returned to his vehicle to check on the driver's license and to run a warrants check on defendant. "A seizure within the meaning of the fourth amendment occurs only when the officer by means of physical force or show of authority has in some way restricted the liberty of a person." *State v. Trujillo*, 739 P.2d 85, 87 (Utah Ct. App. 1987). Further, "[w]hen a reasonable person, based on the totality of the circumstances, remains, not in the spirit of cooperation ... but because he believes he is not free to leave," a seizure occurs. *Id.; see also United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). Defendant was, therefore, seized when Stroud took her name and birthdate and expected her to wait while he ran a warrants check. Under the totality of the circumstances, defendant was reasonably justified in her belief that she was not free to go.

Now, the concern is whether the seizure was reasonable and permissible under the fourth amendment. In *State v. Deitman*, 739 P.2d 616 (Utah 1987) (per curiam), the Utah Supreme Court adopted the reasoning in *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir. 1984), wherein the Fifth Circuit specified three constitutionally permissible levels of police stops:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

Deitman, 739 P.2d at 617-18.

We conclude that the present case involves a "level two" stop. Thus, to justify the seizure, Stroud had to have a reasonable "articulable suspicion" that defendant had committed a crime. To determine if he acted reasonably under the circumstances, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968).

At this point, we defer to the findings of the trial judge because of his preferred position in evaluating the witnesses' credibility. *See Arroyo*, 102 Utah Adv. Rep. at 35. The record indicates that the trial court believed Stroud's testimony in concluding there was an articulable suspicion that defendant had committed a crime. Prior to asking defendant for identification, Stroud believed that there was a possibility the car was stolen because the owner was absent and there was no registration. He knew that the driver was not the owner, but determined that it was reasonable to ask defendant her name to determine if it corresponded with the owner's name he had learned prior to stopping the vehicle. The fact that Stroud initially chose to do a warrants check instead of a stolen vehicle check is of no great significance because not all stolen cars are reported immediately. The trial judge stated that where there is a legitimate traffic stop, the driver has a suspended license, and there is "no way of telling who the owner of the vehicle is and whether they have permission to drive it because the owner is not present," a reasonable officer would inquire regarding the identity of a passenger. In weighing the testimony, the court was justified in finding that the amount of time defendant was required to wait, even though a passenger, was reasonable and did not take any longer than a normal traffic stop.

Thus, there was substantial evidence for the trial court to find as it did. Although a seizure occurred, it conformed to constitutional requirements in that Officer Stroud had a reasonable articulable suspicion that the car could have been stolen, and defendant was not detained for an unreasonable period of time. We, therefore, affirm defendant's conviction.

Regnal W. Garff, Judge

I CONCUR:
Richard C. Davidson, Judge

---

1. At a bench trial, defendant was convicted on stipulated facts testified to at a previous hearing on defendant's motion to suppress.
2. Utah has never drawn any distinctions between these two provisions and has "always considered the protections afforded to be one and the same." *State v. Watts*, 750 P.2d 1219, 1221 (Utah 1988). However, in a footnote comment, the court indicated that it has not ruled out the possibility of making such a distinction in a future case. *Id.* at n. 8.

ORME, Judge (dissenting):

Although the legal analysis applicable to this case is ably set out in the majority's opinion, I cannot agree with their ultimate conclusion that the arresting officer had an articulable suspicion that the automobile had been stolen, much less that defendant had in any way participated in the theft.

The only facts relied on by the officer were that the driver's name was not the name of the registered owner and the driver was not able to locate the registration certificate. These facts are just as consistent with the more likely scenario that the driver borrowed the car from its rightful owner. Absent more--and this is all the officer pointed to--there was simply no articulable suspicion, as a matter of law, that the car had been stolen.

I would accordingly reverse.

Gregory K. Orme, Judge

Cite as
104 Utah Adv. Rep. 36

IN THE UTAH COURT OF APPEALS

WICAT SYSTEMS, and Hartford Insurance Group,
Petitioners,
v.
Sylvia PELLEGRINI, Second Injury Fund of Utah, and Industrial Commission of Utah,
Respondents.

No. 880218-CA
FILED: March 22, 1989

Industrial Commission

ATTORNEYS:

Stuart L. Poelman, Salt Lake City, for Petitioners.

Erie V. Boorman, Second Injury Fund, Salt Lake City, for Respondents.

Before Judges Davidson, Billings, and Garff.

OPINION

DAVIDSON, Judge:

On June 21, 1983, Sylvia Pellegrini, an employee of Wicat Systems, injured her wrist while at work. In 1987, Pellegrini filed a claim with the Industrial Commission for permanent total disability. The parties stipulated that Pellegrini had a preexisting impairment of 46% prior to 1980, that she incurred an additional 12% impairment prior to 1983, that the injury to her wrist caused another 24% impairment,[1] and that she was now, with the wrist injury, permanently and totally disabled. The only issue before the Administrative Law Judge was the proper apportionment between Wicat Systems and the Second Injury Fund.

The A.L.J. determined that Utah Code Ann. §35-1-69 (as amended 1984) controlled, even though Pellegrini's injury occurred in 1983, and so computed Wicat's share of the liability at 24/64ths or 37.5%. Wicat filed a motion for review claiming that the 1981 version of section 35-1-69, which would have placed its share of liability at 12/64ths or 18.75%, should have instead been applied. The Commission denied Wicat's motion.

The sole issue before us is whether the 1984 amendments to section 35-1-69 were procedural or remedial such that they could be applied retroactively to an injury that occurred before the effective date of the amendments.[2] We hold that the amendments were not remedial, and, therefore, did not apply retroactively.

In workers' compensation cases, we generally apply the law existing at the time of injury. *Moore v. American Coal Co.*, 737

APPENDIX B

UTAH STATE COURT OF APPEALS

State of Utah, Plaintiff and Respondent. v. Karen Marie Johnson, Defendant and Appellant.	)	ORDER No. 870222-CA

This matter is before the Court upon a Petition for Rehearing filed by the Appellant.

IT IS HEREBY ORDERED that the Appellant's Petition for Rehearing is denied.

Dated this 5th day of April, 1989.

FOR THE COURT:

Mary T. Noonan
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of April, 1989, a true and correct copy of the foregoing Order was mailed to each of the following:

Debra K. Loy
Joan C. Watt
Attorneys for Defendant and Appellant
Salt Lake Legal Defenders
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

R. Paul Van Dam
State Attorney General
Dan R. Larsen (Argued)
Assistant Attorney General
Attorneys for Plaintiff and Respondent
B U I L D I N G M A I L

_____

Julia C. Whitfield
Case Management Clerk

APPENDIX C

DEBRA K. LOY (3901)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSN.
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION TO SUPPRESS AND NOTICE OF HEARING
Plaintiff,	:	
v.	:	
KAREN M. JOHNSON,	:	Case No. CR86-1728 HONORABLE RAYMOND S. UNO
Defendant.	:	

COMES NOW, the defendant, KAREN M. JOHNSON, by and through her attorney of record, DEBRA K. LOY, and hereby moves the Court to Suppress all evidence seized from her person or property including alleged amphetamines, alleged paraphernalia and alleged burglary tools on the grounds said items were the fruit of an unlawful seizure of her person in violation of the Fourth Amendment to the United States Constitution and Article I, Section 13 of the Constitution of Utah.

DATED this 8th day of January, 1987.

RESPECTFULLY SUBMITTED,

Debra K. Loy

DEBRA K. LOY
Attorney for Defendant

NOTICE OF HEARING

TO THE COUNTY ATTORNEY AND THE CLERK OF THE COURT:

You and each of you please take notice that the above-entitled matter will come on regularly for hearing on the 16th day of January, 1987 at the hour of 11:00 a.m., before the Honorable RAYMOND S. UNO.

DATED this 8th day of January, 1987.

Debra K. Loy

DEBRA K. LOY

DELIVERED a copy of the foregoing to the Office of the Salt Lake County Attorney, 231 East 400 South, Salt Lake City, Utah 84111, this _____ day of January, 1987.

_____

APPENDIX D

but I think it's crucial, if we're this far apart on what the law is, that the Court see the careful analysis of this issue.

THE COURT: I am inclined to deny the motion, but if you feel that you can find some case law that will support it --

MS. LOY: I do.

THE COURT: The cases that I have read, I don't think would support a motion to dismiss in a fact situation such as this where there was a legitimate stop because of a light, the officer asked the driver if she has a driver's license, she produces a driver's license, and the driver's license is suspended.

In addition to that, there's no registration so there is no way of telling who the owner of the vehicle is and whether they have permission to drive it, because the owner is not present. And it would seem to me that a reasonable officer would make inquiry regarding the identification of a passenger in the event the vehicle may be stolen. He doesn't know whether the vehicle is stolen, but there are enough stolen vehicles to justify, you know, reasonable inquiry by an officer. Because if they let someone go, then they're in trouble, because they have let enough go that I know of.

MS. LOY: Well, your Honor, I would ask the

Court then for the opportunity to submit a memorandum because I think the Court, in its own analysis here, is falling in a trap that we fall into frequently in considering the passenger the same as the driver. And I think that there are cases that distinguish that, and I would like to provide that.

THE COURT: If you can find something, I would be glad to read it, but at this stage, you know, I am inclined to deny the motion. But if you can convince the Court that the Court is wrong in its analysis, then I will be glad to read that.

MR. JONES: It's set for trial next Wednesday.

MS. LOY: I think we have a pretrial this Friday, if I can submit --

THE COURT: If you can have it by Friday.

MS. LOY: -- a very brief memorandum with our cases, I would appreciate the opportunity.

THE COURT: All right. Okay.

[Hearing concluded.]

-oo0oo-

APPENDIX E

Because the officer's detention of Ms. Johnson was not supported by a reasonable suspicion based on articulable facts, the detention violated the Fourth Amendment to the United States Constitution. As a result, the evidence obtained as a result of the initial illegal detention, including that obtained in the search of Ms. Johnson's bag, should be suppressed in accordance with Terry v. Ohio, supra.

POINT II. THE DETENTION OF MS. JOHNSON VIOLATED UTAH STATUTORY AND CONSTITUTIONAL LAW.

Article I, Section 14 of the Utah Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

While the Utah Supreme Court has followed the Fourth Amendment standard in deciding search and seizure cases argued under the Utah Constitution, (See State v. Larocco, 742 P.2d 59 (Utah App. 1987), nothing prevents Utah from analyzing this Constitutional provision differently from the federal approach, especially in a case such as this where there is no Fourth Amendment case on point.

In State v. Jones, 706 P.2d 317, 321 (Alaska 1985), the Alaska Supreme Court found that it should "construe Alaska's constitutional provisions such as Article I, Section 14 as affording additional rights to those granted by the United States Supreme Court under the federal constitution." The Court in Jones chose to apply a more rigorous test to determine probable cause under Alaska law than is required under the federal constitution. The Washington

Supreme Court made a similar choice in State v. Jackson, 688 P.2d 136 (Wash. 1984). In Jackson, the Court found that the Washington Constitution provided greater protections then did the federal constitution to the citizens of that state against unreasonable searches and seizures by police. Id. at 143.

In State v. Williams, 366 So. 2d 1369 (La. 1978), an officer stopped a vehicle to issue a citation, and ordered the passengers out of the car. As one of the passengers was getting out, the officer noticed a sawed off shotgun in the car.

The Louisiana Supreme Court noted that:

> (B)y stopping the automobile the police have decided that the driver will be detained. Such is not the case for the passenger, who has not broken the law and who may walk away from the scene unless the police officer has some other legitimate reason to detain him. Certainly the passenger has a higher expectation of privacy than the driver, because the passenger plays no part in the routine traffic infraction and has reason to suppose that any exchange with the authorities will be conducted by the driver alone.

The Williams Court, without deciding the Fourteenth Amendment issue, held that under the Louisiana Constitution the detention of the passengers was not permissible.

Utah Code Ann. §77-7-15 (1953 as amended) provides:

> 77-7-15. Authority of peace officer to stop and question suspect--Grounds. A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

The language of U.C.A. §77-7-15 indicates an intent on the part of Utah's legislature to provide the citizens of this state

with greater protection than is provided by the federal constitution as interpreted in United States v. Merritt, supra.

Pursuant to this statute, a peace officer may stop a person only when the officer has a "reasonable suspicion" that criminal activity has occurred or is about to occur. Hence, while the United States Constitution may allow for police citizen encounters absent a reasonable suspicion (See United States v. Merritt, supra), the Utah Legislature has provided otherwise, requiring a police officer to have a reasonable suspicion to stop and question a person. Hence, Utah statutory and constitutional law require a reasonable suspicion to stop and question an individual, even where the detention does not amount to a "seizure" under the Fourth Amendment.

As outlined in Point I, the officer "seized" Ms. Johnson when he detained her to run a warrants check (See discussion at 5-7) (See also State v. Larocco, supra, for discussion of what constitutes a "seizure"). The language of the statute shows that in Utah, any detention for the purpose of asking an individual's name amounts to a seizure. However, even if this Court does not agree that any detention where the officer asks a person for identification amounts to a seizure pursuant to Utah statutory and constitutional law, the detention of Ms. Johnson in this case was a seizure of her person. The officer detained Ms. Johnson for anywhere from several to fifteen minutes (T. 19, 28). The officer did more than merely obtain information regarding Ms. Johnson's identity. He expected her to remain in the car while he ran a warrants check; she was not free to leave and therefore was

detained. As the Court in United States v. Luckett, supra, found requiring a defendant to wait while a warrants check was run constituted a detention.

The officer in this case had no objective facts upon which to base a reasonable suspicion to justify the detention of Ms. Johnson. The officer did know whether the car was stolen, nor did he run a check to find out even though he had the opportunity to do so (T. 12). Even if the car had been stolen (which it was not), there was nothing to connect Ms. Johnson to a crime which may have been committed by the driver (See State v. Banks, supra). The officer had a hunch which later proved to be incorrect; a hunch does not amount to a reasonable suspicion.

The detention by the officer to check for outstanding warrants also constitutes a violation of Utah Code Ann. Section 77-7-15 (1953 as amended). Pursuant to the statute, an officer must have reasonable suspicion before questioning a person about her name and address. Under the facts of the instant case, no such suspicion could have attached to Ms. Johnson.

As officers lacked reasonable suspicion to justify the detention of Ms. Johnson, the evidence that flowed from the unlawful seizure should have been suppressed.

CONCLUSION

For any and all of the foregoing reasons, Ms. Johnson requests this Court to reverse the conviction and the trial court's ruling on the motion to suppress and remand this case to the trial court with an order to suppress the evidence, and dismiss the charges or provide for a new trial without such evidence.